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U.S. DISTRICT COURT
DISTRICT OF COLORADO

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GREGORY C. LANGHAM
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action No.:

06-CV-01728 REB-MJW

BY 107 DEP. CLK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WATER SUPPLY AND STORAGE COMPANY, in personam,

and

GRAND RIVER DITCH, in rem,

Defendants.

VERIFIED COMPLAINT

Plaintiff, the United States of America, by the authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Secretary of the Department of the Interior, files this Complaint and alleges that:

NATURE OF ACTION

1. This civil action is brought to recover response costs and damages related to the May 30, 2003 breach of the Grand River Ditch in Rocky Mountain National Park pursuant to the Park System Resource Protection Act, 16 U.S.C. §§ 19jj, et seq. (hereinafter "PSRPA"), and pursuant to the March 21, 1907 Stipulation between defendant Water Supply and Storage Company

("WSSC") and the United States Forest Service regarding the operation and maintenance of the Grand River Ditch.

JURISDICTION AND VENUE

2. This Court has jurisdiction in this matter pursuant to the PSRPA, 16 U.S.C. §§ 19jj, et seq., and 28 U.S.C. §§ 1331, 1345 and 1355.

3. Venue is proper within this District pursuant to 28 U.S.C. § 1391(b) and (c), and 1395, because the violations complained of, and the claims asserted herein, arose in this district, because defendant Water Supply and Storage Company is found in this district, and because the property subject to the in rem action is found in this district.

DEFENDANTS

4. At all times pertinent to this complaint, Water Supply and Storage Company, a Colorado corporation, was the owner and operator of the Grand River Ditch.

5. The Grand River Ditch is a drainage ditch carved into the slopes of the Never Summer Range, approximately 1000 feet above the Colorado River and Kawuneeche Valley. The ditch is approximately fourteen miles long and is up to 17 feet wide and 5 feet deep. It originates on the south side of Baker Gulch, about 0.6 miles outside of Rocky Mountain National Park at an elevation of approximately 10,280 feet, cuts along the east side of the Never Summer Range within park boundaries, leaves the park at La Poudre Pass at an elevation of approximately 10,175 feet, and terminates at the Long Draw Reservoir. The Grand River Ditch is described with more particularity in the attached Exhibit A.

STATUTORY BACKGROUND

6. The PSRPA provides that “any person who destroys, causes the loss of, or injures any park system resource is liable to the United States for response costs and damages resulting from such destruction, loss, or injury.” 16 U.S.C. § 19jj-1(a).

7. The PSRPA provides that “[a]ny instrumentality, including but not limited to a vessel, vehicle, aircraft, or other equipment that destroys, causes the loss of, or injures any park system resource shall be liable in rem to the United States for response costs and damages resulting from such destruction, loss, or injury.” 16 U.S.C. § 19jj-1(b).

8. The PSRPA provides that “park system resource” means “any living or non-living resource that is located within the boundaries of a unit of the National Park System, except for resources owned by a non-Federal entity.” 16 U.S.C. § 19jj(d).

9. The PSRPA provides that “response costs” means “the costs of actions taken by the Secretary of the Interior to prevent or minimize destruction or loss of or injury to park system resources; or to abate or minimize the imminent risk of such destruction, loss, or injury; or to monitor ongoing effects of incidents causing such destruction, loss, or injury.” 16 U.S.C. § 19jj(c).

10. The PSRPA provides that “damages” includes “the cost of replacing, restoring, or acquiring the equivalent of a park system resource; and . . . the value of any significant loss of use of a park system resource pending its restoration or replacement or the acquisition of an equivalent resource.” 16 U.S.C. § 19jj(b). Where the resource cannot be replaced or restored, “damages” includes “the value of the park system resource.” Id.

GENERAL ALLEGATIONS

11. In or around 1894 the WSSC began constructing a drainage ditch, now known as the Grand River Ditch, along the slopes of the Never Summer Range in what was at that time the Medicine Bow Forest Reserve.

12. The Grand River Ditch captures snow melt and rain water from the east side of the Never Summer Range and diverts it over the Continental Divide at La Poudre Pass to the Long Draw Reservoir. From there, the water flows into the Cache La Poudre River, where it is further transported to water users along the Front Range and eastern plains.

13. An April 25, 1906 Department of Interior regulation provided that: "Whenever a right of way is located upon a forest or timberland reserve, the applicant must enter into such stipulation and execute such bond as the Secretary of Agriculture may require for the protection of such reserves." 34 Pub. Lands Dec. 583 (Apr. 25, 1906).

14. On or around March 21, 1907, A.A. Edwards, President and duly authorized agent of WSSC entered into a Stipulation ("1907 Stipulation") with the United States Forest Service regarding the Company's Application for Right of Way through the Medicine Bow Forest Reserve for the "conduit" that would later be known as the Grand River Ditch. On June 28, 1907, C.S. Chapman, the Acting Forester for the Medicine Bow Forest Reserve, approved the 1907 Stipulation.

15. The 1907 Stipulation relates to the operation, maintenance, and other activities of the Grand River Ditch right of way and specifically requires WSSC: "To pay the United States for any and all damage sustained by reason of use and occupation of said forest reserve by the

Company, its successors and assigns, regardless of the cause and circumstances under which such damage may occur.”

16. On July 12, 1907, the Acting Secretary of the Interior approved the map of the Grand River Ditch, as required by statute then in effect, to provide a right of way to WSSC for the Grand River Ditch. See Act of March 3, 1891, §§ 18-21, 26 Stat. 1095, 1101-02 (codified as amended at 43 U.S.C. §§ 946-949), repealed by the Federal Land Policy and Management Act of 1976, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701-85).

17. In 1915 Rocky Mountain National Park was established. Act of January 26, 1915, 38 Stat. 798 (codified as amended at 16 U.S.C. § 191 et seq.). In 1930 portions of the Medicine Bow Forest Reserve, including the portions of the Never Summer Range through which the majority of the Grand River Ditch flows, were added to Rocky Mountain National Park. Act of June 21, 1930, §1, 46 Stat. 791 (codified at 16 U.S.C. § 192b).

18. In a February 25, 2000, Stipulation Between the United States and WSSC filed in the case titled In the Matter of the Application of the United States of America for Reserved Water Rights in Rocky Mountain National Park, In Grand County (Case No. W-1768) (Dist. Colo. Water Div. No. 5), the United States and WSSC agreed that the 1907 Stipulation remains in full force and effect and that the National Park Service is a successor-in-interest of the United States Forest Service with regard to the March 21, 1907 Stipulation.

19. On information and belief, WSSC must remove accumulated snow, ice and debris from the Grand River Ditch each spring before runoff from the Never Summer Range can be diverted safely through the ditch.

20. On information and belief, during the spring of 2003 WSSC began removing accumulated snow, ice and debris from the Grand River Ditch two weeks later than it had in prior years.

21. On information and belief, WSSC received a written warning from at least one employee that the delay in removing accumulated snow, ice and debris from the Grand River Ditch could result in a ditch breach.

22. On information and belief, during the spring of 2003, but prior to May 30, 2003, WSSC closed some or all of the Grand River Ditch bypass gates (thereby causing the ditch to divert water) before snow, ice and other debris was adequately removed from the ditch.

23. On or around May 30, 2003, the Grand River Ditch breached approximately 2.4 miles south of La Poudre Pass, within the boundaries of the Rocky Mountain National Park.

24. The breach was caused by water backing up in, and eventually overtopping, the ditch, as a result of excess accumulated snow, ice and other debris in the ditch.

25. Approximately 105 cubic feet per second of water from the Grand River Ditch emptied through the breach and plunged to the valley below.

26. Water flowing through the breach excavated a gully measuring approximately 167 feet wide and 60 feet deep.

27. A large portion of the mountainside below the breach was washed to the valley floor by the erosive power of water, rock, mud and vegetation.

28. The breach caused significant damage to an old growth lodgepole and spruce/fir forest, Lulu Creek, the upper Colorado River, and associated wetlands, all within the boundaries of the Rocky Mountain National Park.

29. The breach caused over 60,000 cubic yards of sediment to flow into the upper Colorado River and associated wetlands.

30. Much of the upper Colorado River watershed within the Rocky Mountain National Park was closed to visitors until water levels receded and damage to trails, bridges, and campsites could be repaired.

31. On or around June 1, 2003, bypass gates on the Grand River Ditch were opened, reducing the flow of water through the Grand River Ditch and through the breach. In early June of 2003, a temporary 18 inch culvert was installed to transport the remaining water through the breach area.

32. In July and August of 2003, two 60-inch culverts were installed to carry water through the breach area and allow the Grand River Ditch to operate at water levels that do not exceed approximately 225 cfs.

FIRST CLAIM FOR RELIEF
(Park System Resource Protection Act – *in personam*)

33. The allegations set forth in Paragraphs 1 through 32 above, inclusive, are realleged and incorporated herein by reference.

34. On or about May 30, 2003, while under the operation and control of the Water Storage and Supply Company, water from the Grand River Ditch breached the banks of the ditch,

causing extensive destruction of, loss of, and injury to a sub-alpine forest, Lulu Creek, the upper Colorado River, wetlands (and associated flora and fauna), trails, bridges and campsites within Rocky Mountain National Park.

35. The sub-alpine forest and wetlands (and associated flora and fauna), trails, bridges and campsites impacted by this incident are “park system resources” as that term is defined within the PSRPA.

36. The breach of the Grand River Ditch within the Rocky Mountain National Park resulted in the destruction of, loss of, and injury to park system resources.

37. The breach of the Grand River Ditch within the Rocky Mountain National Park caused the United States to incur significant “response costs” and “damages” as those terms are defined by the PSRPA.

38. Pursuant to the PSRPA, 16 U.S.C. § 1911(a), Defendant WSSC Company is liable for all past and future response costs and damages resulting from the destruction of, loss of, and injury to park system resources within Rocky Mountain National Park caused by the breach of the Grand River Ditch.

SECOND CLAIM FOR RELIEF
(Park System Resource Protection Act — *in rem*)

39. The allegations set forth in Paragraphs 1 through 38 above, inclusive, are realleged and incorporated herein by reference.

40. The Grand River Ditch is an instrumentality that destroyed, caused the loss of, or injured park system resources within Rocky Mountain National Park.

41. Pursuant to the PSRPA, 16 U.S.C. § 19jj-1(b), the Grand River Ditch is liable to the United States in rem for all past and future response costs and damages resulting from the destruction of, loss of, and injury to park system resources caused by its breach.

THIRD CLAIM FOR RELIEF
(1907 Stipulation)

42. The allegations set forth in Paragraphs 1 through 41 above, inclusive, are realleged and incorporated herein by reference.

43. The breach of the Grand River Ditch caused damage to adjacent lands and improvements, including extensive damage to a sub-alpine forest, Lulu Creek, the upper Colorado River, wetlands (and associated flora and fauna), trails, bridges and campsites within Rocky Mountain National Park.

44. Pursuant to the 1907 Stipulation, Defendant Water Storage and Supply Company is liable for any and all damage the United States sustained as a result of Defendant Water Storage and Supply Company's use of the Grand River Ditch, regardless of the cause and circumstances under which the damage occurred.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the United States of America, prays the Court:

1. That judgment be entered in favor of Plaintiff United States, against all Defendants, jointly and severally, for all response costs and damages in accordance with 16 U.S.C. §19jj et seq., together with interest and costs;

2. That Defendant Grand River Ditch be condemned and sold to pay such judgment;

3. That judgment be entered in favor of Plaintiff United States and against Defendant Water Supply and Storage Company for any and all damage sustained as a result of Defendant's use of the Grand River Ditch in accordance with the 1907 Stipulation, together with interest and costs;

4. For such other and further relief as the Court shall deem just and proper.

DATED: August 31, 2006

Respectfully submitted,

SUE ELLEN WOOLDRIDGE
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

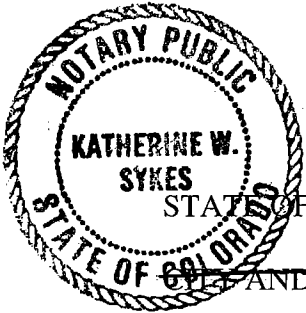
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VERIFICATION

I, Karl Cordova, a Park Biologist for the National Park Service based in Rocky Mountain National Park, hereby verify that to the best of my knowledge, information and belief, the facts stated in the foregoing complaint are true and accurate.

KARL CORDOŤA
Park Biologist
National Park Service



STATE OF COLORADO)
) ss. Larimer
 CITY AND COUNTY OF DENVER)

The foregoing VERIFIED COMPLAINT was sworn to and subscribed before me this 30 day of August, 2006, by Karl Cordova.

My Commission Expires: 9/8/09

Notary Public - Colorado
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